February 25, 2013

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

Re: In the Matter of Applications of Sprint Nextel Corporation, Transferor SoftBank Corporation, and Starburst II, Inc., Transferees (IB Docket No. 12-343)

Dear Ms. Dortch:

I write to address concerns about the Commission's foreign investment policies set forward by some critics of SoftBank's proposed acquisition (via its control of Starburst II, Inc., the United States company that will hold the direct ownership position) of a controlling approximately seventy percent share of Sprint Nextel Corporation ("Sprint Nextel").[1] In my view the issues are straightforward. For compelling public interest reasons, the FCC has created a *presumption* in favor of allowing foreign corporations from World Trade Organization ("WTO") member countries to indirectly own and control U.S. common carriers with licensed radio spectrum. This FCC policy also allows the United States to fulfill its binding trade obligations to permit this form of foreign investment under commitments made in the World Trade Organization's 1997 Basic Telecommunications Agreement (the "WTO BTA"). This arrangement serves the interests of the United States in pursuing international trade policies that are of great importance to the American economy.

My understanding of the foreign investment policy issues at play in the above-captioned proceeding is informed by my work as a scholar, a former Chief of the International Bureau of the FCC, and the former Senior Counselor to the United States Trade Representative ("USTR"). As a scholar, I am the Qualcomm Professor of Communications and Technology Policy at the University of California, San Diego, where I also serve as the Dean of the School of International Relations and Pacific Relations. Since the 1980s, I have written extensively on the optimum design of national regulatory and international trade rules for telecommunications markets. As a FCC official from 1994 until 1997 (first as a Branch Chief in the International Bureau and then as Chief of the International Bureau), I played a significant role in the reformulation of FCC policies governing international telecommunications markets and in the U.S. negotiation of the WTO BTA. I was Chief of the International Bureau when it issued the Notice of Proposed Rulemaking that proposed how to revise the FCC's policies regulating international telecommunications markets, including the rules concerning foreign investment under Section 310(b)(4) of the Communications Act of 1934 (the "Act"), in light of the WTO BTA. In 2008, I served as the co-chair of the Presidential Transition Team for international trade policy for President Obama. I then served until February 2010 as the Senior Counselor to the USTR, Ambassador Ron Kirk. My responsibilities as part of the leadership team of USTR included issues involving trade and foreign investment in international services, including telecommunications services and investment.

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[1] I am the Qualcomm Professor of Communications and Technology Policy at the University of California, San Diego. This letter was commissioned by Sprint. The views expressed are my own.

This letter, which speaks only to the issues of foreign investment policy raised by the filings in this proceeding, is organized in three parts. It begins with a review of the FCC rules and policies pertaining to foreign investment. Then, to provide an analytic context, it reviews the goals and logic that motivated these rules and policies. Finally, it comments on the specific foreign investment claims leveled by critics of SoftBank's proposed investment in Sprint Nextel.

The Commission Rules and Policies Pertaining to Foreign Investment

In my view the correct interpretation of FCC rules on foreign investment (and binding U.S. trade commitments at the WTO) is straightforward. The relevant provisions of the FCC's rules and policies are set forth below.[2]

1. There is "a presumption in favor" of permitting WTO member applicants to "obtain Section 214 authority, authorization to exceed the Section 310(b)(4) foreign ownership benchmark, or a cable landing license."[3]

2. It is presumed to be in the public interest to allow more than 25 percent indirect foreign ownership (and, thus, allowing the option of control) of a U.S. telecommunication carrier with common carrier radio licenses covered under Section 310(b)(4) of the Act. (This legislative act covers common carrier and broadcast radio licenses, not non-common carrier services or facilities.) This presumption applies to all foreign companies from WTO member countries. Indirect ownership refers precisely to the kind of mechanism outlined in the proposed acquisition of Sprint Nextel by SoftBank and its U.S. subsidiary, Starburst II.

3. The presumption is rebuttable, but only in "rare cases."[4] An example of such a "rare case" would be a very high risk of anti-competitive conduct that the Commission's safeguards could not address. In these cases the Commission might attach additional conditions to the licenses or deny an application. The Commission explicitly recognizes that the binding trade obligations of the United States under the WTO BTA mean that there would have to be a very high bar set for any claims about why the presumption should be rejected.

4. The public interest reasons for the presumption of permitting indirect ownership and control of radio licenses covered by Section 310(b)(4) are the benefits of increasing competition, and thus consumer welfare, in the domestic United States and the global telecommunications market. While the Commission still requires that every applicant for such licenses (both U.S. and foreign) has to make a public interest showing in favor of their control, the Commission establishes a presumption that permitting foreign ownership of carriers with these licenses could stimulate investment and new know-how in U.S. networks and competition among carriers serving United States customers. Just as importantly, by granting the right to foreign ownership and service provision in the United States market in the context of the WTO BTA, the FCC is also encouraging the growth of a competitive international telecommunications market and

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[2] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

[3] *Id*. ¶ 13.

[4] *Id.*

improved market access for U.S. firms wishing to serve and invest in the markets of other countries. The Commission also noted in the *Foreign Participation Order* that its new rules advanced the public interest in regard to United States international trade policy. In short, the Commission holds that the mutual opening of national telecommunications under the WTO BTA improved the market access opportunities for U.S. firms.

5. In the case of licensing international wireline communications carriers affiliated with foreign carriers, the Commission created a set of additional safeguards that it could impose to prevent anti-competitive behavior that was deemed possible due to the particular conditions then prevailing in that market. However, the safeguards are a potential condition imposed on a license, not a bar to the license. And the Commission stated that it expected expanded competition in the cross-border service market to cause most of these anti-competitive threats to dissipate over time. In the 1997 *Foreign Participation Order* and in the years since then, the Commission has clearly stated that these threats do not exist with regard to traffic conditions controlled by non-dominant carriers on international routes with WTO members.[5] Most importantly, the potential competition issues related to cross-border wireline traffic are not deemed a threat to the pro-competitive consequences of increased foreign investment in the U.S. market for mobile telecommunications services.[6]

6. The Commission explicitly recognizes (in agreement with filings from the Executive Branch) that other public interest issues involving national security, law enforcement, trade policy, and foreign policy need to be addressed as part of license transfer proceedings. The Commission, however, explicitly rejects the notion that it should limit the presumption in favor of foreign investment because of these issues. Instead, it referred to mechanisms already existing in 1997 for taking account of security and law enforcement issues by allowing for a set of negotiated arrangements between the foreign company and the U.S. Government to resolve these issues.[7] In short, the Commission concludes that any measures necessary to deal with particular issues concerning security and law enforcement can be dealt with using conditions and should not bar grant of an authorization.

The Policy Goals and Policy Logic of the Commission's Rules

The FCC rules that I have just outlined emerged out of the Commission's multi-year effort to significantly improve the competitive performance of the U.S. international telecommunications market and the global telecommunications market. At the dawn of the massive commercialization of the Internet and the World Wide Web, the Commission was concerned that prices for international telecommunications were too high and the infrastructure too limited because of the inefficient way that the global market was organized. As a result, the Commission declared that a competitive global market with companies

[5] SoftBank is clearly non-dominant under the standard established in the *Foreign Participation Order*. *Id.* ¶ 17. Moreover, a subsequent FCC reconsideration of the *Foreign Participation Order* further relaxed some of the general competitive safeguards on 214 applications in light of growing global competition. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order on Reconsideration, 15 FCC Rcd 18158 (2000).

[6] *Foreign Participation Order* ¶ 102.

[7] *Id.* ¶¶ 62-63.

permitted to create network infrastructure and services on the basis of competitive market incentives and technological opportunities would far better serve the American public interest.[8]

The Commission also declared that assisting U.S. companies in engaging in competitive opportunities in foreign telecommunications markets would advance this set of public interest goals. In 1995, the Commission created the Effective Competitive Opportunities ("ECO") test to assess whether other countries had created market entry opportunities and competitive conditions that were equivalent to those prevailing in the United States.[9] Telecommunications carriers from countries meeting this test were to be granted the right to invest in U.S. common carriers controlling spectrum licenses. At the time, the Commission said that this test would be amended if a WTO agreement on basic telecommunications services provided sufficient market opening and competition in the world market to make such country-by-country assessments unnecessary. Indeed, in the WTO BTA negotiations, America's principal trading partners pointed out, rightly in my judgment, that if all countries adopted such detailed assessments of other countries domestic arrangements, the endless investigations and rulemakings could slow the growth of international competition and investment in the global telecommunications markets and the process would be as much a burden on U.S. companies as their foreign competitors.

This multi-year effort set the stage for the new Commission rules and policies that emerged after the WTO BTA. In the *Foreign Participation Order*, the Commission began:

> An efficient and cost-effective global telecommunications marketplace is essential to an emerging information economy…The United States…urged foreign governments to open their markets to competition and to adopt procompetitive, transparent regulatory policies in order to foster the growth of a global information infrastructure…In light of the United States' WTO market access commitments and the market-opening commitments of our trading partners, as well as our improved regulatory framework, we find that it serves the public interest to adopt rules in this Order to complete our goal of opening the U.S. market to competition from foreign companies, in parallel with our major trading partners. We adopt an *open entry standard* [italics added] for WTO Member country applicants that favors their participation and will enable U.S. consumers to enjoy the benefits of increased competition…[The Commission is] guided by the…objective of promoting competition in the U.S. market, and of achieving a more competitive global market for all basic telecommunications services…We expect that entry by foreign telecommunications carriers and other investors will increase competition in the U.S. telecommunications service market, providing lower prices and increased quality of service.[10]

In creating its WTO rules and policies, the Commission made explicit findings, endorsed by the Executive Branch (including the Office of the United States Trade Representative) that the WTO BTA had secured competitive market openings covering over 85 percent of the world market, supported by enforceable

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8 *Regulation of International Accounting Rates*, *Phase II*, Fourth Report and Order, 11 FCC Rcd 20063 (1996).

9 *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873 (1995).

10 *Foreign Participation Order* ¶¶ 1-4 (emphasis supplied).

(through the WTO dispute resolution system) national commitments on pro-competitive regulatory policies. This constituted a credible basis for shifting from case-by-case examinations of other countries to a policy that established a presumption in favor of entry into the U.S. by companies from WTO member countries. As a result, the ECO test was discarded and replaced by the rules and policies that I have previously summarized. It is noteworthy that the Commission's policy, with the support of the U.S. Executive Branch, is explicitly grounded on the finding that opening the U.S. market to foreign investment in communications services significantly advances the market access opportunities for U.S. companies around the world. Both the Commission and the Executive Branch have continued to endorse this opinion during the Administrations of Presidents Clinton, Bush, and Obama. This is a bipartisan consensus.

It should be noted that the trajectory of the global market since 1997 has affirmed the Commission's logic. The prices for international services have declined dramatically. As late as 1994, the average price of calling internationally to major industrial economies from the United States was over seventy cents per minute. Today, there are options (such as Skype) that effectively make calls free to many countries. The fiber optic infrastructure linking countries has exploded, and its ownership structure is hugely diversified. Wireless communications services have expanded around the world in the numbers of subscribers, the technological capacity of services (*e.g.*, the introduction of 3G and 4G networks and mobile apps), and the variety of service options. Direct foreign investment has played a large part in this expansion. Such investment provides capital, technology expertise, and management know-how. The combination of wireline and wireless broadband networks promises the continuing growth of economic and other societal benefits, and many of these benefits will be because the services enabled by the communications infrastructure are global in their logic and scope of application.

Analysis of the Comments on Foreign Investment by Critics of the Proposed Transaction

The objections to the proposed SoftBank investment in, and control of, Sprint Nextel in regard to foreign investment policy seem to cluster around four themes: (1) the transaction fails to meet the general public interest test for licenses covered by Section 310(b)(4); (2) the transaction undermines U.S. companies (and their employees) in competition with foreign suppliers; (3) the transaction raises significant national security concerns; and (4) the transaction places control over spectrum of great value to U.S. educational and religious institutions in a company that has few roots in the American community and therefore will not be a good partner to these institutions. I comment on each objection in sequence.

1. <u>The public interest test for licenses covered by Section 310(b)(4).</u> The FCC's rules and policies create a clear presumption that foreign ownership and control (via indirect ownership) is beneficial to U.S. competition and, thus, to U.S. consumers. I note that Sprint Nextel, SoftBank, and Starburst argue that SoftBank has both the self-interest and track record to provide the benefits envisioned by the FCC. In particular, they point out that when SoftBank took control of Vodafone K.K. in Japan, SoftBank quickly built market share through pricing innovations, improved services, investment in the network infrastructure, and the provision of complementary value-added (Internet) content. After an $8 billion investment in Sprint Nextel that also necessarily triggers heightened scrutiny by the U.S. and Japanese governments, it is hard to see why SoftBank would not undertake a comparable strategy to strengthen Sprint Nextel's position in the United States. While commenters can always question the likely competitive success of these strategies, or the precise way in which SoftBank might roll out an expanded infrastructure and service package, the FCC has found that only in "rare cases" will it

deny an authorization to a foreign investor from a WTO country. This declared policy of a "presumption" to grant of an authorization is exactly the opposite of the assertion of the Communications Workers of America ("CWA") that the FCC's policy requires a "high bar" for saying that foreign investment and control is in the public interest.[11] I would add that there was a high bar for establishing the Commission's presumption to grant authority—and that bar was hurdled successfully back in 1997.

The Commission also has clearly declared, in a manner consistent with U.S. international trade obligations, that it will not impose any special conditions regarding competition or general market conduct simply because SoftBank is a foreign company. Thus, the Commission should assess the claims of threats to competition arising from the transaction in exactly the same way that it would for any non-dominant U.S.-based company. The same applies to any issues regarding consistency with FCC spectrum policy. The FCC's foreign investment rules and policies certainly give no credence to the following claim of The Consortium for Public Education and The Roman Catholic Diocese of Erie, Pennsylvania: "Grant of the Application would give a foreign company control of an impermissible amount of U.S. spectral resources..."[12]

2. <u>Competition with foreign suppliers.</u> In its petition to deny, CWA objects that SoftBank control of Sprint Nextel will reduce market access opportunities for U.S. firms and hinder U.S. firms' competitive strength in the world telecommunications market. Therefore, it argues that the FCC should deny the transaction. As with its argument about a "high bar," CWA has ignored the basic logic and rules of both Commission policy and U.S. international trade policy. The U.S. Government pursued the WTO BTA (and a closely related trade agreement covering the emerging hybrid equipment for the Internet such as modems and routers called the Information Technology Agreement) in order to create a more open market for U.S. companies and a better performing global information infrastructure for U.S. consumers. The WTO BTA and the Information Technology Agreement created these opportunities by establishing enforceable trade rules for access to liberalized telecommunications and information markets around the world. In the *Foreign Participation Order*, the FCC specifically found that the WTO BTA had fulfilled its long-standing goal of improving the competitive access of U.S. telecommunications companies in foreign markets.

   It is worth being explicit regarding why the United States cannot get without giving in regard to trade. In order to negotiate for market access in other countries, it is, as a matter of diplomacy and common sense, necessary to offer access to your own national market. CWA may worry that some U.S. telecommunications firms have done poorly in open international competition. Judging by their filing's examples they have special concern for the fate of U.S. suppliers of telecommunications equipment. But it should be noted that many U.S. companies have prospered in this liberalized global market. Three names in the equipment industry—Cisco, Qualcomm, and Apple—illustrate these successes. And the liberalized global telecommunications and information service markets were indispensable to the successes of companies like Google.

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[11] Petition to Deny or Impose Conditions of Communications Workers of America, IB Docket No. 12-343 (Jan. 28, 2013).

[12] Petition to Deny of the Consortium for Public Education and the Roman Catholic Dioceses of Erie, Pennsylvania, IB Docket No. 12-343, at ii (Jan. 28, 2013).

That said, the United States Trade Representative has made further liberalization of foreign telecommunications and information markets into a standing policy priority. Our bilateral and regional free trade agreements (such as the US-Korea Free Trade Agreement and the proposed Trans-Pacific Partnership) have put great emphasis on further liberalization of these markets. In addition, the USTR has put a priority on pursuing specific complaints about market access for U.S. telecommunications under existing trade rules. The rules of the WTO submit such complaints to a well-developed dispute resolution process that permits successful claims to be enforced through trade sanctions. It is no help to U.S. trade diplomats to open the United States to a potential claim that it has violated trade rules by discriminating against a foreign firm simply because it may use foreign supplied equipment. There is no WTO exception to U.S. obligations to allow foreign investment in U.S. carriers simply because of the foreign carrier's equipment procurement policy. (I address the special case of allegations of national security concerns below.) Indeed, under long-standing U.S. national policies, U.S. telecommunications carriers have the right to choose their equipment based on market considerations. And in a competitive global market for telecommunications equipment, we should expect (and have observed) that U.S. based carriers are going to choose their suppliers on the basis of such criteria as price, reliability, service support and technology advantages. They will not opt to buy equipment from a supplier simply because of its U.S. home base. Foreign firms, just like U.S. firms, also have the right to choose their equipment suppliers on the basis of market considerations. Anything less would violate U.S. trade obligations and has no basis in FCC rules.

3. <u>National security concerns.</u> CWA also argues that this transaction poses significant national security risks because SoftBank has employed ZTE and Huawei in its network in Japan and may now introduce this equipment into the United States. CWA cites concerns of various authorities that ZTE and Huawei have inappropriate ties to Chinese security agencies and may have hidden features in their equipment that would allow spying on, or sabotage of, U.S. networks. Whatever the merits of such claims, the FCC rules and policies have explicitly stated that security concerns are not a basis for denying a license by a foreign company from a WTO member. Instead, they are to be addressed in negotiations between the applicant foreign firm and the security agencies of the Executive Branch. These negotiations will produce an appropriate set of conditions designed to resolve the security concerns. According to the filings by SoftBank and Sprint Nextel, such negotiations are now underway.

4. <u>Spectrum.</u> The Consortium for Public Education and The Roman Catholic Archdiocese of Erie, Pennsylvania, make a fourth argument: "More disconcerting, approval of the transaction would result in an unprecedented, and simply unacceptable from any policy and public interest standpoint, transfer to foreign control of the only U.S. wireless spectrum allocated exclusively to education institutions…it is against U.S. interests to allow control of the U.S. educational spectrum to a foreign company with no commitment or ties to the hundreds of government, educational, nonprofit and religious institutions to which EBS is licensed."[13] In parsing this argument, there are important considerations of law, policy, and elementary logic.

   To begin, to the extent that this is an argument about the spectrum controlled by Clearwire (and that appears to cover all of the relevant spectrum licenses), the argument ignores the law

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[13] *Id*. at 2, 14.

governing foreign investment. The limits on foreign investment in licenses covered by Section 310(b)(4) apply to common carrier and broadcast licenses, not to non-common carrier licenses like those held by Clearwire. Thus, there is no legal basis for imposing a limit on the license based on foreign ownership considerations *per se*.

If we set aside the statutory basis for denying a license based on foreign ownership, we are still left with the Commission's finding that there is a presumption of open entry and licensing for companies from WTO member countries that seek authorizations under Section 310(b)(4). The benefits for competition and consumer welfare (including improving technology and greater investment in network infrastructure) are matched by the public interest benefit of fulfilling U.S. international trade obligations at the WTO. There is no provision made for consideration of educational services as a special exception to the FCC's presumption.

Finally, we can turn to logic. By the logic of the objection, citizens of a country should trust the commitment of foreign corporations to meet their obligations under a license less than if owned by a national firm from their own country. This reasoning implies that French citizens should trust United Airlines less than Air France, or Japanese citizens should trust IBM Analytic Services less than competitive offerings from Fujitsu in Japan. On the face of this there is neither evidence or logic upholding this reasoning. And, as the home of the world's largest group of multinational firms, the United States would be ill-served if it endorsed this logic. Indeed, in the 1980s the United States Government waged a vigorous campaign of trade diplomacy with Japan that rebutted claims sometimes heard in Japan at the time that only Japanese companies could truly understand and serve the needs of Japanese customers. Those claims have largely disappeared in Japanese markets today, and it would be hugely ironic (and self-defeating to the U.S. national interest) if the United States Government somehow endorsed such notions when acting on this application by SoftBank.

Perhaps the real meaning of the filing's claim is that a foreign-owned corporation will exercise less social responsibility (*e.g.*, support for education) than a local one. Leaving aside the questionable empirical power of the assertion (take, for example, the large expenditures by U.S. companies on behalf of schools in countries where they operate around the world), the logic of the petition to deny would require the Commission to state that, as a matter of U.S. policy, it presumes that we should trust foreign corporations less to fulfill the expectations of corporate social responsibility. The FCC would further have to conclude that, as a result, the U.S. Government should deny market entry on the basis of this presumption. The reverberations would be stunning. Governments around the world would have a license to cite the U.S. policy precedent when restricting market entry for U.S. firms in health and information service markets, to name just two, because they would not be as good corporate citizens as local firms. To put it mildly, this would be a very bad turn of events for U.S. economic interests around the world and an endorsement of a kind of nationalism that can only fuel ill-will in every corner of the globe.

Conclusion

I write with the recognition that the record in a proposed acquisition of this scale is laden with many issues, both big and small. I do not comment on most of the issues related to SoftBank's proposed indirect investment in Sprint Nextel. However, this transaction offers an excellent opportunity for the Commission to reaffirm one of its most successful policies to make the global information infrastructure competitive, technologically progressive, and a source of constantly growing value for U.S. consumers. This is its policy of “open entry” into the U.S. communications market for foreign firms from WTO member countries in the context of a set of global trade rules that promote competition everywhere and open market opportunities for American firms and their employees in every WTO country.

Sincerely,

/s/ Peter F. Cowhey

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